No. 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Question Presented

Whether the Court of Appeals correctly held, upon undisputed facts, that respondent's advertising was not deceptive or misleading, and that the Federal Trade Commission's decision against respondent was unwarranted and contrary to its own established precedents.

Statement

The facts are here stated as the opinion of the Court of Appeals stated them (R. 238-239), with the addition of a statement of the proceedings through the Court of Appeals:

"Mary Carter Paint Co. is engaged in the business of manufacturing, selling, and distributing paint under

the trade name of 'Mary Carter.' At the time of the hearings, the company distributed its paints in more than 27 states of the United States through over 500 retail outlets, including both company stores and franchise dealers. Although still a small company in the paint industry (its share of national paint sales is under one percent), the company has increased its sales from one million dollars in 1955 to twelve million dollars in 1960, a growth achieved by increasing the number of retail outlets and building the repeat business of satisfied customers.

"The basic business policy of Mary Carter, consistently followed over the past ten years, has been to manufacture and sell paint of high quality at a net cost to the consumer of half the amount he would pay for paint of comparable quality manufactured by leading national brand companies. This policy of giving 'double value' is carried out in a merchandising practice of pricing a can of Mary Carter paint at a price comparable to the price of national brand paints of comparable quality, and advertising and giving the purchaser a second can free. Thus, typical Mary Carter advertising in newspapers, magazines, radio, television, store signs, lithographed can tops, and truck sides, states: 'Buy One, Get One Free'; 'Every Second Can Free of Extra Cost'; 'Every Second Can Free'.

"Mary Carter's merchandising policy and the reason for it are specifically stated in advertisements which explain that Mary Carter paint is 'quality priced' and that the company will not 'second rate' its paint with a low-price tag—a point of particular importance

in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price.

"The quality of Mary Carter paint is not questioned. Indeed, at the hearing, Commission counsel contended that the quality of Mary Carter paint was not an issue, and the hearing examiner ruled that the evidence offered on the subject by Mary Carter was immaterial. The Commission has upheld that ruling. The evidence was taken for reporting, however, and both the evidence and the examiner's report of the evidence establish that Mary Carter paints are as good as, or superior to, paints marketed under leading national brand names at prices comparable to the single can price of Mary Carter paints.

"In accordance with Mary Carter's consistent merchandising practice, the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased, the purchaser being entitled to receive without extra cost a second can of the same kind of paint or of any other similarly or lower priced Mary Carter paint. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price.

"There was no evidence, at the hearing, of consumer complaints or of any deception of Mary Carter customers. The extent of consumer satisfaction with Mary Carter paints and with the value offered and

given is indicated, however, by the company's increased sales and, particularly, its repeat-customer sales."

The complaint of the Commission charged that respondent's use of the word "free" in its advertising was "misleading and deceptive," in that "The second can of paint was not, and is not now, 'free', that is, was not, and is not now, given without cost to the retail purchaser since the purchaser paid the advertised price, which was, and is now, the usual and regular retail selling price for two cans of Mary Carter paint."

Respondent answered and maintained at the hearing, before the Commission, and before the Court, that its advertising was a fair and realistic representation of the bargain which it gave and that its use of the word "free" in its advertising was sanctioned by the Commission's decisions in *Matter of Walter J. Black, Inc.*, 50 F. T. C. 225 (1953) and *Matter of Book-of-the-Month Club*, 50 F. T. C. 778 (1953), and the Commission's "Free Rule" as stated in its Guides Against Deceptive Pricing.

While for a time prior to 1953, the Commission took the position that the word "free" in advertising could not be used unless the free item was given away by the advertiser as a "gift or gratuity" without requiring the purchase of any article or attaching any other condition (*Matter of The Book-of-the-Month Club*, 48 F. T. C. 1297 (1952)),[1] the Commission in 1953 ac-

[1] The Book-of-the-Month Club offered a "free" book to subscribers who agreed to purchase at least four books from the Club, and for every two books purchased from the Club the purchaser was to receive a book "free." The Commission found the use of the word "free" to

knowledged that its prior ruling was essentially unrealistic. Then, in recognition of the fact that consumers are fully aware of the economics of offers of a "free" article upon the purchase of an article, and that businessmen the country over had been so using the word "free" in their merchandising and advertising for over a hundred years and were entitled to certainty in their knowledge of its propriety, the rule was laid down by the Commission that ("Until such time as either the Congress of the United States amends Section 5 of the Federal Trade Commission Act, or until an appellate court of the United States clearly interprets the existing provisions of Section 5 of the Federal Trade Commission Act to mean otherwise . . .") a second article may be advertised as "free," although the purchase of an article is required in order to get the second article free, provided the price of the first article is the ordinary and usual price of such merchandise and the price is not increased or the quality or quantity reduced as a predicate of offering the second article "free." (*In the Matter of Walter J. Black, Inc.*, 50 F. T. C. 225, 235-236).[2]

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describe the "enrollment" book to be false, misleading and deceptive, but found that the like charge with respect to the "free" book given with each two books purchased had not been sustained. The order issued was against using the word "free" to describe any book "which is not given to the recipient thereof without requiring the purchase of other merchandise." The Commission reasoned that if the consumer could obtain the "free" item only upon the condition of purchasing some other article, the item was not literally "free" in accordance with the "definite and absolute meaning" of that word, because the purchase price paid by the consumer for the one article included the cost of the "free" item.

[2] Black in his "Detective Book Club," which sold triple volumes of three detective stories, offered a volume "Free" with a membership obliging a member to buy four volumes in twelve months.

In giving its rationale for overruling the *Book-of-the-Month Club* decision, the Commission in the *Black* case quoted with approval from a brief which had been filed in behalf of the Commission in the Supreme Court in *FTC* v. *Standard Education Society,* 302 U. S. 112 (1937), and adopted its language as the reasoning of the Commission (50 F. T. C. at 234):

> "It is true that the cost of the premium is borne by the manufacturer or seller, and that this cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premuim is the same as the price with the premium the premium does not cost the customer anything. It is FREE TO HIM regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss."

The holding of the *Black* decision, followed by a like revision of the order previously entered in the *Book-of-the-Month Club* case (50 F. T. C. 778), was incorporated in the Commission's subsequently promulgated "Free Rule" (Dec. 3, 1953), which established rules governing the use of the word "free" where receipt of the free item was conditioned upon the purchase of another item (R. 59).[3]

[3] The Commission's "Free Rule" at the time of the complaint and decision of the Commission read as follows:

> "In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word 'free,' or any other word or words of similar import, in

The initial decision of the hearing examiner against respondent in this case went primarily on the ground that Mary Carter's free offer did not meet the Commission's "Free Rule" requirement that the conditions for receipt of the free article be clearly and conspicuously

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advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:

"(1) When all the conditions, obligations, or other prerequisites to the receipt and retention of the 'free' article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer will be misunderstood; and, regardless of such disclosure:

"(2) When, with respect to any article of merchandise required to be purchased in order to obtain the 'free' article or service, the offeror (a) increases the ordinary and usual price of such article of merchandise, or (b) reduces its quality, or (c) reduces the quantity or size thereof."

As restated, effective January 8, 1964, the rule reads as follows:

"Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at a price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1¢ Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or ½ free, or for only 1¢, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the 'free' or '1¢' item. It is important, therefore, that where such a form of offer is used, care be taken not to mislead the customer.

"Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1¢' additional merchandise) to the offer, the consumer may be deceived.

"Accordingly, whenever a 'free,' '2-for-1,' 'half price sale,' '1¢ sale,' '50% off' or similar type of offer is made, all terms and conditions of the offer should be made clear at the outset."

stated. That conclusion was reached although (a) no such claim had been made in the complaint or suggested at any time during the hearing, and (b) the advertising referred to in the complaint and decision as "typical" concededly (in the examiner's own words) "leaves little doubt that payment must be made for the first can." The Commission necessarily rejected the examiner's principal ground of decision (R. 42).

The Commission did, however, accept the examiner's holding that Mary Carter's advertising was not permissible because the "free" second can of paint was "not a gift of gratuity," although the Commission felt obliged to state in its decision that it "did not thoroughly understand the hearing examiner's reasoning on this point" (R. 42, 48).

At the hearing, the examiner excluded evidence proffered by Mary Carter to show that the quality of its paint was equal to or better than the quality of national brand paints similarly priced per single can. The evidence was excluded upon objection by counsel for the Commission that the quality of Mary Carter paint was not questioned and was not in issue. Under FTC Rules of Practice § 4.12(f), the hearing examiner received the evidence, however, for reporting purposes.[4]

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[4] The evidence consisted of (a) testimonial and documentary evidence by Alfred Driscoll, a paint testing expert, detailing twenty different tests made under his direction of Mary Carter paints and five competitive brands of paint in five different categories (R. 107-121; RX id. 9A-E, R. 183-188); (b) testimonial and documentary evidence of production quality controls maintained and tests made of Mary Carter paint in the regular course of manufacture (R. 101-103); (c) testimonial and documentary evidence of comprehensive compara-

Commission counsel made no counter-offer of proof but availed himself of the privilege of cross-examining the Mary Carter witnesses.

The examiner made findings for reporting purposes with respect to the excluded evidence. The substance of the findings made was that (in absence of evidence litigiously offered in opposition thereto) Mary Carter paint was shown to be "equal to or better than comparable, similarly-priced, top-quality national brand paints" (R. 34).

The majority of the Commission found the present case "distinguishable" from the *Black* and second *Book-of-the-Month Club* cases in that, as stated, there was no "usual and customary price" established for a gallon or quart of Mary Carter paint because Mary Carter had always sold its paint on the basis of giving a second can to a purchaser who desired it upon the purchase of one can. "Consequently," said the majority, "even if the item required to be purchased, i.e., a single can of Mary Carter paint, had had a usual and regular price when the offer was first made, the price would eventually become the usual and regular price of two cans of paint" (R. 47). The majority also said

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tive performance tests of Mary Carter paints and leading national brand paints by Mary Carter laboratory technicians (R. 129-133; RX 19 A-Fid., R. 189-197); (d) testimony of the low percentage of consumer complaints concerning Mary Carter paints (R. 91, 128-129); (e) testimony of consumer acceptance of Mary Carter paints as demonstrated over the years by increased sales, repeat sales, and by an independent consumer preference survey (R. 88, 133, 138); (f) testimony concerning the qualification of Mary Carter paint for the Good Housekeeping Seal of Approval (R. 136-138); (g) testimony concerning the qualification of Mary Carter paint for the American Hotel Association certificate of acceptability (R. 133-35).

the cases were "distinguishable" in that the merchandise required to be purchased in *Black* and *Book-of-the-Month Club* "was not always the same merchandise," that is, the offering was a "series of offers" involving different books at different prices, whereas Mary Carter's continuing offer was of a "combination of the same two articles" (R. 47). So, finally, the majority stated that the policy statement with respect to the use of the word "free" announced in the *Black* decision "is not applicable to respondents' advertising" since the cost of one can or two cans was the same, hence "the cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the purchaser" (R. 48).

Commissioner Elman, in dissent, said that the majority's holding that Mary Carter had not established a single can price for its paint "simply is not so" (R. 58). He noted that a single can price was fixed and that a can could not be bought for less, and that although the customer may and usually does take the second "free" can, whether he does or not the first can will still cost him the set price. "Thus, to paraphrase Black, the 'regular price' of Mary Carter paint 'sold without the premium is the same as the price with the premium.' The second can of paint 'does not cost the customer anything;' regardless of how it is paid for, it 'is Free To Him.' " (R. 60-61).

As to the majority reasoning that the second can could not be regarded as "free" because its cost was included in the price paid by the purchaser for the first can, Commissioner Elman said: "All this is perfectly

obvious to all concerned here, as it also was in *Black* and *Book-of-the-Month Club*. And, unless those cases are now overruled, they permit use of the word 'free' in such circumstances" (R. 59).

Of the distinction which the majority drew between Mary Carter and *Book-of-the-Month Club,* Commissioner Elman observed that both cases involved a like "continuing offer over an indefinite period of time that can be acted on again and again by the same purchasers," and "The fact—deemed crucial by the Commission—that Mary Carter's paint remains the same while the Club's book titles change is obviously a distinction without a difference" (R. 61).

Commissioner Elman concluded that in any event the majority's "strained effort to 'distinguish' *Black* is much ado about nothing" because of the more crucial and fundamental failure to indicate how Mary Carter's offer would deceive. Of this, Commissioner Elman said (R. 64):

> "This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Section 5 of the Federal Trade Commission Act by engaging in any 'unfair or deceptive acts or practices'. Yet nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did. The word 'deceptive' appears in the Commission's opinion on page 2 in a description of the allegations of the complaint and again on page 10 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's 'Buy 1 and

get 1 Free' offer, or as to how that deception might be brought about."

The Court of Appeals agreed with Commissioner Elman, particularly that the Commission in this case had departed from its established rules on which Mary Carter "had every right to rely" and had reverted to its discarded reasoning in the first *Book-of-the-Month Club* case; that it had not done this forthrightly, however, but had purported to find this case "distinguishable" from *Black* when it was "indistinguishable;" and that the Commission decision had the "serious deficiency," pointed out by Commissioner Elman, that "nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did" (R. 243).

Judge Brown, concurring, noted that the "precise action" of Mary Carter was permitted by *Black* and the Commission's "Free Rule;" that Mary Carter's offer met "fully, honestly, and in good faith" the requirement of the "Free Rule;" and that with the Commission holding that Mary Carter may not do what the Commission's two pronouncements clearly permit, "Mary Carter is the victim of individualized discrimination" (R. 248).

Summary of Argument[5]

The Commission acknowledges the propriety, recognized by Commission decisions and rules, of the use of the word "free" in advertising a premium given with

[5] The argument of this brief, including the Summary, will follow the Commission's brief and respond to its arguments in the order in which they are made. References to the Commission's brief will be "Br." with the page number.

the sale of a "tying" product if the combination does not cost more than the "tying" product costs separately (Br. 6). This use of the word "free," it is explained, communicates to the public that the manufacturer is offering an incentive to purchase which is a "*bona fide* benefit to the consumer" (Br. 6).

Precisely so here. The combination of the "free" premium given by Mary Carter with the purchase of the "tying" product of a quart or gallon of paint costs the purchaser no more than the "tying" product costs separately. And unquestionably, the premium is a *bona fide* benefit to the consumer.

The Commission is in error in what it seemingly means by stating that "The present case admittedly involves no violation of the standard established in the *Black* case because it concerns a product which had no 'ordinary' price or 'usual' quality or quantity other than under the terms of the challenged offer" (Br. 7).

The price of a single can of Mary Carter paint, admittedly, is the only price at which a single can may be purchased and is the price at which it is purchased, and both quality and quantity have been maintained, and, as the cost of the product with the premium is the same as the cost of the product alone, the premium is "FREE" to the purchaser, as described and declared in the *Black* decision. The use of the word "free" here is thus clearly sanctioned by the *Black* and *Book-of-the-Month* decisions of the Commission, and in holding otherwise the Commission was in "violation of the standard established in the *Black* case."

The statement of the "view" of the Commission that "the amounts designated by respondents in their

advertising as the price per single can of Mary Carter paint has, in fact, been the usual and regular price of two cans of such paint," hence it is deceptive for respondent to call any can "free" (Br. 8), and the statement that "here, the 'tying' product has no ordinary price independent of the package," hence the premium cannot be called "free" (Br. 9), and the repetition of variations of such statements that run throughout the Commissions brief, are a single argument that the term "free" cannot be applied to a premium that is always given with the "tying" product. But that is exactly the merchandising that was involved in both *Black* and *Book-of-the-Month Club* and the argument is foreclosed by those decisions.

Black's club and the Book-of-the-Month club regularly and continuously offered "free" books with purchased books. Black offered a "free" book with every enrollment commitment to buy books, and Book-of-the-Month offered a "free" book with the enrollment purchase and a "free" book with every purchase of two books.

A companion argument designed to suggest deceptiveness in Mary Carter advertising is that "When respondent advertises that it is offering a 'free' can with every can that is purchased, consumers are led to believe that the offer is for a limited time only," and this "induces purchases which might not otherwise be made" (Br. 8).

It is notable that this argument is advanced by the Commission for the first time in its brief before this Court. It is not suggested in the opinion of the Com-

mission, nor was it suggested to the Court of Appeals. The argument is insupportable; indeed, it is self-contradictory, and, of course, it is at odds with the *Black* and *Book-of-the-Month* decisions.

When respondent regularly advertises that it is offering a "free" can *with every can that is purchased,* consumers cannot be led to believe that the offer is for a limited time only. Far from there being any such implication or intention to give any such impression, respondent's advertising has consistently and constantly carried the message of "Every Second Can Free." This has not merely been the message constantly repeated in newspapers, magazines, radio and television, but it has been imprinted on store fronts, truck sides and every can top. The Commission is thus straining far beyond the arguable in suggesting that respondent is deceptively leading consumers to believe that its "free" offer is for a limited time only.

If there were any basis for such an argument, *Black* and *Book-of-the-Month* would have been equally susceptible to it. The argument cannot be made here with the pretense of respecting those decisions.

Nor does the Commission progress in arguing that, even if no "limited time" implication were "lurking" in respondent's advertisements, they would still be deceptive in a misleading use of the word "free" (Br. 8), by retrogressing to the premise, sound in itself, that "The only meaningful sense in which a product 'tied' to the purchase of another product or service may be called 'free' . . . is when the price is no greater for the package than for the identical 'tying' product alone" (Br. 8-9), and repeating, factually incorrectly,

that here the "tying" product had no "established" price (Br. 9). The factual assertion is an *ipse dixit,* which, as Commissioner Elman stated, "simply is not so" (R. 58). The uncontradicted evidence is that a single can price for each item of Mary Carter paint has not only been established but strictly adhered to. The "free" offer of Mary Carter is entirely in accord with the "meaningful sense" of a price "no greater for the package than for the identical 'tying' product alone."

ARGUMENT

I

Respondent's "Buy One, Get One Free" Advertising Is Not Deceptive

A. The Advertising Does Not Misrepresent the Customary Price of Respondent's Paint

The first and apparently principal argument now advanced by the Commission in support of its decision—an argument in no way suggested in its decision—is that Mary Carter advertising created the "misapprehension" in the minds of buyers that the "free" offer was for a limited time only and that they should "buy for fear that the offer will lapse if they delay" (Br. 10).

In support of this argument the Commission brief states that some of respondent's advertisements stated clearly that it had always been respondent's policy to sell "Two-for-One"[6] and that it intended to continue

[6] Respondent has neved used the slogan "two-for-one" or been charged with doing so. Apparently the Commission would now like to introduce that phrasing into the case to make its subsequent argument (Br. 31-32) based on Guide V of the Commission's Guides Against Deceptive Pricing, not mentioned in the complaint or found to have been violated.

to do so (R. 200-201, 203, 204, 213, 216), but that most of the advertisements contained no such explicit announcement (R. 199, 207, 208, 210, 211, 212, 214, 215, 217, 218, 219).

The latter citations of advertisements lend no support to the Commission's very belated suggestion that the advertising is not clear or gives any impression that the "free" offer is for a limited time only. A reference to the cited advertisements will show that they contain, as has all the advertising, including store fronts, truck sides and can tops, the wording "Every second can free."

It seems to us a strange approach to suggest that all the advertising had to make it "explicit" that the offer was a continuing and not for any limited time, when there was absolutely nothing in the advertising to intimate that the offer was for a limited time, and that, failing such explicitness, the advertising should be regarded as creating the "misapprehension" that the offer was for a limited time only. Nevertheless, the advertising could hardly have been more explicit than it was or better calculated to inform the consuming public as to the company policy, carried into practice, of offering a second can free with *every* can purchased. We submit that it is not only much too late but much too tenuous to attempt to sustain the decision of the Commission upon the ground that the advertising did not "clearly" state respondent's policy.

B. The Advertising Does Not Misleadingly Characterize the Second Can as "Free"

The Commission argues that respondent's "free" offer means only that it is selling paint "cheaper,"

and it would force respondent to sell its paint only on a straight single gallon basis of $3.49 or $6.98 a gallon (Br. 12-14). The Commission would thus play the game and accomplish the aims of the combine of paint manufacturers in the National Paint, Varnish and Lacquer Association, which conducts a constant national publicity campaign of planted articles against "cheap" paint.

We respectfully refer the Court to Respondent's Exhibit No. 6 for identification at page 181 of the record for a sample of this most intensive and extensive campaign to prejudice the public against any paint that sells for less than the prices maintained by the leading paint makers.

As the Court of Appeals pertinently observed, Mary Carter's merchandising policy for good reason is to price its paint in accordance with its quality and not "second rate" it with a low price tag—"a point of particular importance in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price" (R. 238-239).

We submit that respondent is not compelled to make itself the victim of this competitive combine and to set up its merchandising and advertising as its competitors would order it, so that they may discredit the product, not by any direct challenge to its quality, which could not be sustained, but by the innuendo of the characterization of "cheap paint."

In this connection the Commission brief (Br. 13 fn.) makes reference to respondent's showing that its paints are equal or superior in quality to leading national brand paints of the same single can price and that its

"free" offer is a fair and realistic expression of the double value given. The Commission in its decision regarded this fact as immaterial. Now it is suggested that all the fact proves is that respondent's product is "cheaper" than other paints of equal or lesser quality, not that respondent gives "a benefit at no extra cost" (Br. 13-14).

We would think that even on the Commission's analysis respondent's pricing would have to be considered a "benefit" to the consumer, and its advertising as passing the test suggested in the early part of the Commission's brief, *i.e.*, that it "communicates . . . a *bona fide* benefit to the consumer" (Br. 6).

Niceties of expression aside, it has always seemed to us that what the Commission and Court would be most interested in knowing is whether the respondent's product, pricing and advertising are honest or a fraud. Perhaps the Commission was not required to go into the *bona fides* or benefit on its case, and the respondent was hardly required to do so in the light of the factuality of its selling a single can only at the single can price and giving a second can "free," as that term is understood in contemporary advertising and sanctioned by the decisions of the Commission in the *Black* and *Book-of-the-Month* cases. But the proof on value would seem pertinent in any event, and we submit significant as a matter of substance in showing the true measure of the benefit the consumer receives through respondent's merchandising.

The Commission cites *Federal Trade Commission* v. *Standard Education Society,* 302 U.S. 112, as being "essentially the same" as the case against Mary Carter (Br. 16). Something more than the extract quoted

from that decision is necessary to make the comparison, or contrast.

In the *Standard Education Society* case—which the Commission did not deem sufficiently apt to mention in its decision here, although it was cited to the Commission by its counsel both in the briefing and argument before the Commission on its review of the hearing examiner's initial decision—the use of the word "free" was part of a blatant fraud scheme. As stated in the opinion of this Court, the "plan" of the respondents in that case involved an elaborate scheme of false representations to sell encyclopedias, including fictitious testimonials and a false listing of contributors to the encyclopedia. The Court noted that as a "first step" in the fraud scheme a salesman would obtain an audience with prospective purchasers by false representations that "by reason of their prestige and influence they have been selected by the Company to receive a set of books free of cost for advertising purposes." And, "After respondents' agents thus gained an audience by the promise of a free set of books, they then moved forward under the same general sales plan, by falsely representing that the regular price of the loose-leaf supplement alone was $69.50, and that the usual price of both books and loose-leaf supplements was much in excess of $69.50."[7]

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[7] The following cases, also cited to the Commission by its counsel but not mentioned in its decision in this case, are now cited in the Commission's brief as following *Standard Education* and being in point here (Br. 17 fn.):

Standard Distributors, Inc. v. *Federal Trade Commission*, 211 F.2d 7 (2d Cir. 1954), involving a fraud scheme in house to house selling of encyclopedias with numerous misrepresentations that the offering was open only to a certain specified number of

It is said that the practice of calling a premium "free" when it is "part of a package which the manufacturer or distributor has always offered for sale and intends to continue to offer for sale in combination form is particularly unwarranted when the 'tying' commodity and the 'free' premium are the identical product" (Br. 17). The described combination of identical "tying commodity and free premium" is an exact description of the offering in *Black* and *Book-of-the-Month Club.*

And the Commission runs afoul of *Black* and *Book-of-the-Month* again when it would condition the use of "free" as the characterization of the premium upon its being offered only "for a limited time or to a limited class of purchasers" (Br. 18). There has never been any time limit on the "free" offer in *Black*

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people in a community, that the regular and usual price of the books or combination of books was greater than the price at which they were being sold, and that the encyclopedias and other publications were an entirely new work. The Court of Appeals agreed with the Commission that the "pattern of conduct" was such as to justify an order of the breadth entered by the Commission, including an injunction against the use of the word "free" in the overall fraud scheme. Even so, however, the Commission subsequently modified its order to conform with the modification made of its original *Book-of-the-Month* order after its decision in *Black.* (*Matter of Standard Distributors,* 51 F. T. C. 677 (1955)).

Basic Books, Inc. v. *FTC,* 276 F.2d 718 (7th Cir. 1960), involving the sale of encyclopedias by high-pressure salesmen to housewives, the salesman's approach being to represent falsely that he was making a "survey" and introductory "free" offer of encyclopedias.

Kalwajtys v. *FTC,* 237 F.2d 654 (7th Cir. 1956), *cert. den.,* 352 U. S. 1025 (1957), involving a calculated series of lies, all aimed at misleading housewives into believing that an unconditional "free" gift was being given and concealing the fact that it was actually a sales transaction.

or *Book-of-the-Month.* While the offer in *Black* was only to new members (membership being free to all), the offer of "free" books by Book-of-the-Month Club was on every purchase of two books. As Commissioner Elman said in assimilating Mary Carter and Book-of-the-Month, "Both involve a continuing offer over an indefinite period of time that can be acted on again and again by the same purchasers" (R. 61).

In arguing that a premium can "fairly be characterized as 'free' " only if offered for a "limited time or to a limited class of purchasers" (Br. 18), the Commission goes so far as to state, "This is the basis for the Commission's decision in the *Black* case and in *Book-of-the-Month Club, Inc*" (Br. 18 fn.). There is not only no basis for the statement, it is clearly contrary to the fact.

While the "free" offer in *Black* was, as we have just noted, only to new members, this was not true in *Book-of-the-Month*; nothing was said in the *Black* decision to suggest that such limitation had anything to do with the rationale of decision; and in neither case was there any element or consideration of a time limit on the offer.

Nor could the Commission possibly think that it is open to it to argue that the *Black* and *Book-of-the-Month* decisions, and its "Free Rule" distilled therefrom, are premised upon any time limitation on the "free" offer or imply that the time over which the offer is made is any consideration in determining the legitimacy of the use of the word "free."

This is evident from the Official Transcript Of Proceedings Before The Federal Trade Commission, In The Matter Of Proposed Guides Or Rules Relating To

Deceptive Pricing And The Use Of The Word "Free," of June 10 and 11, 1963. Before the Commission republished its Guides Against Deceptive Pricing, effective January 8, 1964, it issued a set of proposed guides or rules and held a public hearing for the purpose, as there expressed by Chairman Dixon, of "affording all the interested parties an opportunity to present their views on the subject of deceptive pricing and use of the word 'free'." The hearings were attended by a large number of representatives of trade associations, Better Business Bureaus, corporations, publications, law firms and others, offering their comments and suggestions. To focus attention and discussion on the alternatives of dealing with and regulating the use of the word "free" in advertising, the Commission published for consideration alternative forms of a "free" rule, one of which, "A", would have been a reversion to the original *Book-of-the-Month* rule, and the other, "B", was essentially the same as the rule formulated in *Black* and published as a rule in 1953 (*supra*, p. 6 fn. 4). Of the many who commented upon or offered suggestions with respect to the wording of the "free" rule, hardly any favored proposed rule "A". There were several, however, including the National Paint, Varnish and Lacquer Association spokesman, who expressed the view that the existing rule should be amended to add that the "free" offer could be made only for a limited time, as by adding a clause that the offer could not be a continuous or unlimited time offer (Official Transcript, pp. 424-425).

Obviously no one thought that there was any such limitation in the existing rule and the question was

whether something new should be added. The discussion of the subject was sharpened by a remark made and question put by Chairman Dixon to the representative of the National Paint, Varnish and Lacquer Association. As the Chairman said, "The *Black* rule, if I conceive it correctly, dealt purely and simply with the use of the word 'free.' It had nothing to do as to whether it was limited or unlimited or anything else" (Official Transcript, p. 435). Then, referring to the recommendation "that we should add this additional feature to the *Black* rule," the Chairman said that *Black* "laid down a rule that if you conspicuously and in the same type of language, and in connection therewith, explain the offer that it was all right. What is the difference? If it is done regularly, daily, when we are talking about the word 'free'? What is the difference? What does the limitation of time have to do with the word 'free' is what I am trying to get at." (Official Transcript, p. 436)

And clearly in the end the Commission was not persuaded that the additional feature should be added, for it was not added, and the rule was finally republished in substantially the same form as it had previously existed and as it was formulated in *Black* (*supra,* p. 7 fn.)

Therefore it is not admissible for the Commission to contend now that the *Black* decision or the rule distilled from *Black,* or the "free" rule as it existed at the time of its decision in this case, or as it exists now, imposed any time limitation on the "free" offer, or that the use of the word "free" can be held to be deceptive or distinguished from the use permitted by

Black or *Book-of-the-Month* on the basis that the offer is a continuing one and is not limited in time.

The claim that the Commission makes, in closing its argument on this point, to respect of great weight for its determination (Br. 19-20) is out of place in this case. It amounts to a plea for abandonment of judicial correction of its errors and indulgence in arbitrariness. Its expertise in deceptiveness cannot excuse a failure to show deceptiveness. Such a showing is entirely lacking here. If this were a case of first impression on the issue raised by the complaint, the plea for "due weight" for its determination might have some appeal upon the ground that in an area of policy determination the Commission should have a latitude of discretion. But the policy was determined and stated in *Black* and *Book-of-the-Month*. The authority of those decisions is binding upon the Commission. *Vitarelli* v. *Seaton*, 359 U. S. 535, 539-40 (1959); *Service* v. *Dulles*, 354 U. S. 363, 372 (1957); *United States ex rel. Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954).

Conceivably the plea for respect for its determination might have some force if it had said, despite the solemnity of its pronouncement and rule formulation in *Black*, that upon reconsideration it thought the rule should be changed and a semblance of reason were given for the change. But here the Commission purports to recognize and respect the authority of *Black* and *Book-of-the-Month*. It relies on claimed distinctions between those cases and the present case. The distinctions do not exist. The Court of Appeals was entirely correct in holding that the Commission had failed to distinguish the cases or show any deceptiveness in re-

spondent's advertising. Judge Brown was also correct in saying that "Mary Carter is the victim of individualized discrimination" in the decision that was rendered against it by the Commission.

II.

The Commission Has Not Adequately Explained Why It Considered Respondent's Advertising Deceptive

The many deficiencies and complete untenability of the majority opinion of the Commission can most readily be observed by reading the opinion (R. 40-49) and Commissioner Elman's dissent (R. 50-66). The dissent really leaves nothing more to say. After pointing out the manifest errors in the majority opinion and its failure to make any valid distinction between this case and *Black* or *Book-of-the-Month*, Commissioner Elman concluded by referring to "perhaps the most serious deficiency in the majority opinion"—"nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did . . . we are never informed as to who is, or might be, misled by Mary Carter's 'Buy 1 and get 1 Free' offer, or as to how that deception might be brought about" (R. 64).

The Court of Appeals was in complete agreement with Commissioner Elman.

The argument now made by Commission counsel addressed to the point that "The Commission adequately explained why it considered respondent's advertising deceptive" (Br. 21-24) is really confession but hardly avoidance.

With the tendered excuse that the Commission's opinion was cast in terms of respondent's argument before the Commission, it is said "it did not (and could

not be expected to) consider some of the underlying premises" regarding the deceptive nature of respondent's advertising (Br. 21). Counsel "believe," however, that the Commission's view was that it was deceptive to use the word "free" in any situation other than one having an independent "usual and customary retail price"—which Mary Carter paint certainly had—although counsel find that "the opinion did not elaborate the Commission's reasons" and "did not explicitly focus upon the nature of the misrepresentation involved here" (Br. 22-23).

Finally, it is claimed that the decision of the Commission, "in light of its earlier cases," clearly draws the line between what is permissible and what is impermissible, although the reasons are only "implied" in the opinion (Br. 24).

The claim to clarity in drawing the line is belied, however, by the closing statement in the Commission's brief, that "If the Court upholds the Commission's position on the merits, the Commission believes that it would be appropriate to remand the case to it for clarification of its order" (Br. 34 fn.).

That is all that is said on the subject of the order, but its significance, when understood, is that lack of clarity in the order reflects lack of clarity in the opinion and inability of the Commission to distinguish between Mary Carter, Black and Book-of-the-Month.

The order of the Commission (R. 38) is that respondent "cease and desist from representing, directly or by implication:

> "(a) That any amount is respondents' customary and usual retail price of any merchandise when said amount is in excess of the price at which such merchandise is customarily and usually sold by

respondents at retail in the recent and regular course of business;

"(b) That any article of merchandise is being given free or as a gift, or without cost or charge, when such is not the fact;"

The order is meaningless. It certainly is not what is claimed for the opinion, a "clearly" drawn "line between what is permissible and what is impermissible." It is rather, as Commissioner Elman observed, "indefensibly vague,"[8] and, as the Court of Appeals ob-

[8] Commissioner Elman said the following of the order (R. 65):

"A reading of the order invites this question: What must respondents stop doing that they are now doing? Paragraph '(a)' declares that they may not call any amount their usual and customary price if it is in excess of their usual and customary price in the recent, regular course of business. Obviously, this has as little to do with the case as Guide V of the Guides Against Deceptive Pricing. Respondents have never sought to represent their 'recent' prices; they advertise only their current prices. As it happens, however, their current prices are the same as their recent prices. Whether regarded as a one-can or two-can price, respondents' advertised price of $2.25 per quart, for example, is their 'usual and customary retail price' now, and it is not in excess of $2.25 per quart, which is 'the price at which such merchandise is customarily and usually sold by respondents at retail in the recent and regular course of business'. Does this mean that paragraph '(a)' has no effect at all on respondents' advertising practice? Surely not, or the Commission would not issue it. But what effect does it really have, and how are respondents to comply with it? I confess I do not know.

"Paragraph '(b)' is almost as puzzling. Presumably, it is intended to require respondents to cease advertising 'Buy 1 and get 1 Free'. But this cannot be deduced from anything to be found in the terms of the order. As the Commission's own troubles with the problem show, the definition of 'free' merchandise is no easy matter. Yet respondents are ordered, on pain of heavy penalties, to cease and desist from describing merchandise as free 'when such is not the fact'. Surely this provision, like paragraph '(a)', is indefensibly vague, particularly in light of the Supreme Court's recent call for Commission orders 'sufficiently clear and precise to avoid raising serious questions as to their meaning and application'. Federal Trade Commission v. Henry Broch & Co., 368 U. S. 360, 368 (1962)."

served, "no more than a generality of legal statement which lacks any precision of meaning adequate to satisfy the requirement of clarity and applicability which the Supreme Court has said is the essence of a Commission order. *F.T.C.* v. *Henry Brosch, Inc.*, 368 U.S. 360."

The deficiency of the order does not make it "appropriate" that the case be remanded to the Commission for "clarification" of its order, as the Commission now suggests.[9]

The deficiency, reflecting the deficiency and untenability of the Commission's decision, calls for an affirmance of the Court of Appeal's order setting the order of the Commission aside.

III

The Commission Decision in This Case Is Not Consistent With the Commission's Precedents and Announced Rules

As has been noted: the Commission recognizes and purports to maintain the authority of its *Black* and *Book-of-the-Month Club* decisions. There is not the slightest suggestion from the Commission that it has intended or wishes to change the holding of those cases in the least. And, since its decision in this case the Commission has reaffirmed its "Free Rule," drawn from *Black*, published in 1953 (*supra*, p. 6, fn.), by republishing it in substantially the same form effective January 8, 1964 (*supra*, p. 7, fn.).

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[9] The deficiency in the order, which the Commission adopted from the initial decision of the hearing examiner, was called to the Commission's attention both in briefs and oral argument when the case was before the Commission on review of the hearing examiner's initial decision. Thus it was that Commissioner Elman made his comments on the order in his dissenting opinion.

There can be no question, therefore, that unless the Commission has drawn a *valid* distinction between the present case and *Black* and *Book-of-the-Month,* its order in this case cannot stand and the decision of the Court of Appeals must be affirmed. *Vitarelli* v. *Seaton,* 359 U. S. 535, 539-40 (1959); *Service* v. *Dulles,* 354 U. S. 363, 372 (1957); *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260 (1954).

We turn then to the "distinguishable" features which the Commission purported to find in its decision in this case, and the quite different distinction tendered in support of the Commission's decision in the Commission's brief to this Court.

First, we will state with full quotation from the Commission's opinion all it said about the cases being distinguishable (R. 47-48):

> "The facts of this case are clearly distinguishable from those of the two cases upon which respondents rely. In this case, the item required to be purchased in order to obtain another article has always been sold with the so-called 'free' article. Consequently, even if the item required to be purchased, i.e., a single can of Mary Carter paint, had had a usual and regular price when the offer was first made, the price would eventually become the usual and regular price of two cans of paint. In Black and Book-of-the-Month Club, however, while the policy of offering 'free' books was a continuing one, the merchandise required to be purchased in order to obtain a 'free' article was not always the same merchandise. In other words, the respondents in those cases made a series of offers involving entirely different books at varying prices, not a

continuing offer of a combination of the same two articles, as respondents in this case have done. Moreover, the cases are distinguishable in other respects. In Book-of-the-Month Club, the respondents advertised that a member of the Club would pay 'no more than the publisher's set price for each Book-of-the-Month, the price you would pay in any retail store; indeed, frequently you pay less.' This representation was never challenged and apparently was accepted as true by the Commission. Furthermore, it appears that in Black, books required to be purchased at stated prices in order to obtain a 'free' article were usually and regularly sold by that respondent at those prices without the 'free' article since the 'free' offer was limited to new members. Consequently, it appears that the Commission had no occasion to decide in either case whether the usual and regular price of a book required to be purchased in order to obtain a 'free' book might at some future date become the usual and regular price of both books."

Four possible distinctions are thus suggested. We will consider them in order.

(1) "In this case the item required to be purchased in order to obtain another article has always been sold with the so-called 'free' article." This was precisely the fact in both *Black* and *Book-of-the-Month*. As their regular merchandising policy and practice, "free" books were always given with purchased books.

(2) Recognizing that the policy of offering "free" books in *Black* and *Book-of-the-Month Club* was a "continuing" one, thus negativing the immediately preceding distinction, it is said that "the merchandise required to be purchased in order to obtain a 'free'

article was not always the same merchandise," *i.e.*, in *Black* and *Book-of-the-Month*, while the merchandise was always books, they were "different books at varying prices," not "the same two articles" as in this case. Passing the point that Mary Carter sells different paints at varying prices, the lack of any substance or validity in the distinction drawn is obvious. As Commissioner Elman observed, "The fact—deemed crucial by the Commission—that Mary Carter paint remains the same while the Club's book titles change is obviously a distinction without a difference" (R. 61).

(3) Book-of-the-Month Club advertised, without challenge, that a member would pay no more for a book than the publisher's set price in a retail store. Nothing is said about either Black's books or Mary Carter's paint in this connection. The fact is that Black's triple volumes of detective stories were sold only through Black's "Detective Book Club" and the Book-of-the-Month Club's books of its own printing and binding are sold only through the Club. Mary Carter paints, sold through Company stores and franchise dealers at retail, are always sold at the manufacturer's set retail price.

(4) In *Black* "the 'free' offer was limited to new members." It is not apparent what difference this would make, but it need not be dwelt upon, for in *Book-of-the-Month* there was no such limitation. It was always the regular practice of the Book-of-the-Month Club to give "free" books to all of its members whenever they purchased books. Thus, Commissioner Elman correctly pointed out that "Both [Mary Carter's offer and Book-of-the-Month's offer] involve a continuing

offer over an indefinite period of time that can be acted upon again and again by the same purchasers" (R. 61).

Turning now to the Commission's latest attempt to distinguish *Black*, and presumably *Book-of-the-Month*, it is argued (Br. 27) that there "the Commission was concerned only with a situation in which a seller had been marketing an article at a standard, ordinary or usual price and wished to offer a 'free' bonus for a limited time or to a limited group of people (i.e., new members)."

While the Commission in its opinion in this case, as has been noted, did attempt a distinction from *Black* on the ground that the offer there was "limited" to new members—a distinction that cannot be made for *Book-of-the-Month*—it said nothing about any "limited time" distinction. There can be none, for there was nothing of a time limit in either *Black* or *Book-of-the-Month*. We have amply pointed out (*supra*, pp. 21-24) that there is no basis for suggesting that *Black* or *Book-of-the-Month* involves, much less turned upon, any time limitation, or for suggesting any distinction between those cases and the present case on that ground.

In the end, the Commission argument comes back to the mere *ipse dixit* repeated throughout its brief that *Black* and *Book-of-the-Month* were cases in which the article required to be purchased had an established price, while here the article has no established price (R. 29). The answer to this unsupported assertion is the one given by Commissioner Elman, previously referred to, it "simply is not so" (R. 58).

Finally, the Commission brief refers to Commission decisions rendered after *Black,* one of which it states "involved facts very close to those in this case" (Br. 29-31)—none of which, however, was so much as mentioned in the Commission's decision in this case. The failure of the Commission to cite those cases in its decision was no oversight, for the cases were cited to the Commission by its counsel on briefing and argument before the Commission on its review of the hearing examiner's initial decision. Obviously the Commission did not find them to be in point or it certainly would have cited them.

It will be recalled that the explanation given in the Commission's brief for the Commission's failure to deal in its opinion with the "underlying premises" of the "deceptive nature" of respondent's advertising was that the opinion "was cast in terms of the arguments respondent made before the Commission"—the "principal contention" being "that the hearing examiner erred in concluding that Mary Carter's advertising was not proper under the so-called 'free rule' enunciated by the Commission in the Black decision" (Br. 21). Surely, therefore, if there were decisions since *Black*, which, as counsel for the Commission now state, "support the result reached here and demonstrate that the rules announced in *Black* were not intended to apply" here, those decisions would have been cited in the Commission's opinion. The only conclusion possible is that the Commission did not then regard them as the "precedents" it now claims them to be.

Indeed, the failure of the Commission to mention any case in support of its decision in this case is

the more significant because Commissioner Elman took the pains to point out that the *Puro Co.* case, 50 F. T. C. 454, then as now advanced by counsel for the Commission as a case that "involved facts very close to those in this case" (Br. 29), was very different from the case at bar (R. 62-63).

When the cases now cited as "precedents" in support of the Commission's decision are looked at it becomes understandable why they were not mentioned in the Commission's opinion.

Puro (Br. 29) was a case of a false pretense that a "coupon" was necessary to get a "free" package of a water softener cleanser, and that the article sold at 25¢, with a second article free with a coupon, when the fact was that the coupon meant nothing and the article regularly sold in stores at 13¢ a single package or two packages for 25¢. Contrawise here, as Commissioner Elman pointed out, "In the instant case, the record does NOT disclose that a single quart of Mary Carter paint was ever sold for $1.13; and, in view of Mary Carter's established and long-continued merchandising policy, it clearly would not sell a single quart at that price" (R. 86-87) and "The Commission does not dispute Mary Carter's contention that it refuses to sell a single can of paint at less than the stated price of $6.98 per gallon or $2.25 per quart" (R. 83-84).

Roy S. Kalwajtys, 52 F. T. C. 721, affirmed 237 F.2d 654 (7th Cir.), *cert. den.,* 352 U. S. 1025 (Br. 30), involved a calculated series of lies, all aimed at misleading housewives into believing that an unconditional "free" gift was being given and concealing the fact that it was actually a sales transaction.

International Association of Photographers, 52 F. T. C. 1450, like *American Albums, Inc.,* 53 F. T. C. 913, (Br. 31) was a case in which sales representatives of respondent, seeking to sell certificates for photographs to be taken and photograph albums, falsely represented that the person called upon had been specially selected to receive a free album and that the price for the albums and certificates were promotional and reduced prices, falsely represented their value, falsely represented respondent's arrangements with photographers, and falsely represented that an order blank was a receipt for a free album.

The Commission concludes its brief by eschewing its applicable "Free" Rule and rearing a straw man. It refers to Guide V of the Commission's Guides Against Deceptive Pricing, which is its rule with respect to "two for the price of one" advertising (Br. 31-32). The import of the reference is not clear, as there is no claim that respondent was in violation of the rule, and there could not be any such claim because respondent has never engaged in "two for the price of one" advertising. As Commissioner Elman stated of the reference to Guide V in the Commission's opinion, "it has no application" to the present case (R. 62).

Were Guide V applicable, however, there is no basis for suggesting that respondent's advertising was not in compliance with its requirement that "the sales price for the two articles is the advertiser's usual and customary retail price for the single article in the recent, regular course of his business." Indeed, the Commission throughout its brief has based its argument that the

second can of Mary Carter paint is not "free" on the fact that the cost to the purchaser is the same for two cans as for a single can.

Looked at in any way, respondent's offer of a second can "free" on the purchase of a can at the established and regularly maintained single can price is an honest representation, altogether proper in accordance with Commission decisions and rules.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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